

# ***City Council***

## ***Study Session Agenda***

**September 12, 2017  
Library Meeting Room  
951 Spruce Street  
7:00 PM**

***Note: The time frames assigned to agenda items are estimates for guidance only.  
Agenda items may be heard earlier or later than the listed time slot.***

- |                  |             |  |
|------------------|-------------|--|
| 7:00 p.m.        | <b>I.</b>   | Call to Order  |
| 7:00 - 8:30 p.m. | <b>II.</b>  | Discussion/Training – Land Use/Quasi-Judicial Public Hearing Process and Rules |
| 8:30 – 9:00 p.m. | <b>III.</b> | Advanced Agenda & Identification of Future Agenda Items                        |
| 9:00 p.m.        | <b>IV.</b>  | Adjourn  |

**SUBJECT: DISCUSSION/TRAINING – LAND USE/QUASI-JUDICIAL PUBLIC  
HEARING PROCESS AND RULES**

**DATE: SEPTEMBER 12, 2017**

**PRESENTED BY: SAM LIGHT, CITY ATTORNEY**

**SUMMARY:**

City Attorney Sam Light will discuss the land use and quasi-judicial public hearing processes and rules related to the City Charter, the Ethics Code, and State Statute. The City Council will be able to ask questions and discuss issues of interest.

**ATTACHMENT(S):**

None.



City Council  
September 12, 2017

Addendum #1  
Items presented at the meeting

# LAND USE/QUASI-JUDICIAL PUBLIC HEARING PROCESS AND RULES

Louisville City Council  
9.12.17 Study Session

## Overview

- ❖ Due process duties that come with land-use decision making.
- ❖ How to conduct a fair and complete land use hearing.
- ❖ Tips for avoiding trouble as a quasi-judge.
- ❖ Tips for good deliberations, include case studies.
- ❖ Understanding legal standards for challenging land use decisions, and how *process* can be more important than *substance*.

## Due Process Duties – Intro.

- ❖ For most land use decisions, the decision is quasi-judicial rather than legislative.
- ❖ In a quasi-judicial process, the key duty is fundamental fairness.
- ❖ The decision-makers—City Council, Planning Commission, Board of Adjustment—are essentially *acting as judges* and therefore must *behave like judges*.

## Due Process Duties – Intro.

- ❖ Contrast – A Legislative Act:
  - ❖ Reflects public policy relating to matters of a permanent or general character.
  - ❖ Not normally restricted to particular individual or entity.
  - ❖ Affects the legal rights of specific individuals only in the abstract.
  - ❖ Prospective in nature.
- ❖ As applied to land use, we are acting as legislators when we make the general rules, *but...*
- ❖ When we apply those general rules to specific persons and property, we are acting as quasi-judges.

## Due Process Duties – Intro.

- ❖ Contrast - A Quasi-Judicial Act:
  - ❖ Determines rights, duties or obligations of a specific individual or entity.
  - ❖ Is based on facts developed at a hearing to resolve the particular interests in question.
  - ❖ In this process, we apply the existing legal standards to the specific case.
- ❖ The key characteristics of a quasi-judicial process are notice, a hearing, and a record-based decision made by a fair and impartial decision-maker.

## Due Process Duties – Types of Acts

### Legislative Acts

- ❖ Adoption of a master plan
- ❖ Consideration of general amendments to the subdivision or zoning ordinance
- ❖ Adoption of development regulations
- ❖ Adoption of an annexation ordinance

### Quasi-Judicial Acts

- ❖ Rezoning, including GDP amendment
- ❖ Special review use request
- ❖ PUD application
- ❖ Variance request
- ❖ Landmarking a historic structure

## Conducting a Fair Hearing

- ❖ In quasi-judicial proceedings, a fair hearing is critical to reaching a good decision and ultimately defending it.
- ❖ Generally, if your decision is legally challenged, your hearing is “the hearing” and reviewing judges don’t “retry” the case—rather, they base their decision upon a review of the record of your public hearing, including:
  - ❖ The procedures you used;
  - ❖ The evidence you considered; and
  - ❖ The reasons for your decision
- ❖ A reviewing judge will judge your conduct against the way he/she would behave as a judge – so keep the “judge” frame of mind when processing and conducting yourself in a land use case.

## Conducting a Fair Hearing

- ❖ **Prepare (& Don’t Wing It):**
  - ❖ Adopt an opening script? This is an opportunity to explain how the hearing will proceed.
  - ❖ Let speakers know there will be time limits and enforce them.
  - ❖ Maintain sign-up cards for the hearing.
  - ❖ Have a plan for dealing with an overflow crowd.
  - ❖ Have a list of applicable decision-making criteria.
  - ❖ Clearly identify what options are available for the decision-makers.
  - ❖ Have available drafts of standard post-hearing motions.
  - ❖ Follow uniform rules of procedure for conduct of your hearings – helpful to you and the public.

## Conducting a Fair Hearing

### ❖ During the Hearing:

- ❖ Use and expect civility; avoid reactive, off-the-cuff and off-topics comments; applies to all participants.
- ❖ Be consistent in requiring recognition by the chair, and in the use of public comment opportunities.
- ❖ Have speakers speak from the podium & direct their comments to Council only. Have them give name and address for record.
- ❖ Consider swearing them in?
  - ❖ Emphasizes formality of matter.
  - ❖ Gives the “signal” that special rules apply.
  - ❖ Enhances evidentiary value of speaker statements.

## Conducting a Fair Hearing

### ❖ During the Hearing:

- ❖ Chairperson: Recognize and exercise your prerogative to maintain order.
- ❖ Do not allow free-wheeling comments from the gallery and if grumbling in the audience gets too loud, restore order politely.
- ❖ If necessary, someone can call for a recess.
- ❖ Consider having speakers disclose whether they are “pro” or “con” when signing up to speak, and call for all “pro” speakers and then all “con” speakers; this can make the hearing more efficient and reduce potential disruption from “back-and-forth.”
- ❖ Manage the record: Identify documents, don’t let two people speak at once; etc.



## Conducting a Fair Hearing

### ❖ During the hearing:

- ❖ Consider a reminder: “Please keep your comments brief so that everyone will have a chance to speak. If your comments are the same as those of a prior speaker, please feel free to simply state that you agree with the prior speaker.”
- ❖ Directly manage the crux issues to help get to the necessary and relevant information.
- ❖ Don’t stray the course for insistent questioners; instead, let them know they’ve been heard and move on. For example: “That is a good question, but this is your opportunity to make **comments** and provide **information**. I’ve noted your question and I think one of us may ask the [staff/applicant] to address your question during the Council’s question and answer period.”

## Avoiding Trouble as a Quasi-Judge

- ❖ Fundamental fairness requires a fair, unbiased and impartial quasi-judge, **both in fact and appearance**.
- ❖ Land use decisions are not overturned because the reviewing judge didn’t “like your decision”—legal rules are deferential to the substance of what you decide.
- ❖ Rather, they more likely overturned because the quasi-judges—as a group or because of individual behavior—deprived the applicant or other participant of fundamental fairness.

## Avoiding Trouble as a Quasi-Judge

- ❖ Don't make up your mind before the hearing.
- ❖ Don't speak with one side or the other before a hearing (ex parte contacts).
- ❖ Don't participate if you have a financial or other personal interest in the matter (code of ethics).
- ❖ Don't make your decision on the basis of irrelevant or non-existent criteria.
- ❖ Don't sign any "pro" or "con" petitions.

## Avoiding Trouble as a Quasi-Judge

- ❖ Don't participate if you know you can't be fair and unbiased.
- ❖ Don't participate in decision if you weren't there for the entire hearing (or didn't at least listen to the rest on tape).
- ❖ Don't make your decision based on things you "know" but did not "learn" at the hearing – For example:
  - ❖ Don't get on Google and offer your own evidence.
  - ❖ Don't offer evidence of your own experiences as the basis for your decision – Aren't you in essence saying "I'm voting for/against the application based on my own testimony?"
- ❖ Do ask for advice on criteria or application of criteria to facts (and executive session if legal advice is essential).

## Avoiding Trouble as a Quasi-Judge

- ❖ A critical duty of the quasi-judge is to avoid “ex-parte” contacts, meaning any “outside the hearing” discussion with an interested party about the subject matter of the hearing.
- ❖ A proceeding loaded with “ex-parte” contacts is a clear path to having your decision overturned and, as important, having the integrity of your process eroded.
- ❖ When we advise against ex-parte contacts, we are protecting your ability to participate in the decision-making, and your ultimate decision.
- ❖ An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.

## Dealing with ex parte contacts

- ❖ **Arm yourself (staff-arm your quasi-judges) with the knowledge you need to deal with citizens who want to talk to you about a pending quasi-judicial issue – keep your “talking points” ready:**
  - ❖ “As a Council, we’ve committed to equal access to and sharing of information. It would really be best if you attended the hearing so that ALL of us can hear the information you want to share.”
  - ❖ “I’d love to hear your views, but my City Attorney advises that the only evidence we can consider as Council members is what we actually hear at the hearing. Please plan to attend the hearing on \_\_\_\_\_ so that I can hear and understand your viewpoint.”
  - ❖ “My City Attorney advises that when I talk to one side or another at any time other than at the hearing itself, it really compromises my ability to maintain the reality and appearance of fairness. Whatever your view, I’m sure you would not want me speaking to the “other side” of this issue outside of the hearing.”

## Deliberations Matter

- ❖ Council discussion of the evidence is critical; this is where:
  - ❖ The Council formulates the bases of its impending decision
  - ❖ The applicant and others obtain an understanding of your position
  - ❖ The reviewing judge looks to understand why you decided the matter as you did (and whether it comports with your criteria and the law)
  - ❖ Deliberate – Talk Amongst Yourselves

## Criteria and Case Studies

- ❖ In preparing for the hearing, consider:
  - ❖ What are the key issues
  - ❖ What relevant questions do I have that will help me decide those issues
  - ❖ Remember - when you are prepared to discuss the criteria, you will arrive at a discussion of the defensible reasons for your decision
  - ❖ Use the “rule of why”?
- ❖ Case Studies

## Case 1-The Metal Headz Café SRU

### Scenario:

- ❖ A new national chain restaurant, Metal Headz Café, is coming to downtown.
- ❖ They are requesting an SRU for outdoor dining and want to have live bands on the proposed patio area until 11 pm and are known for having a heavy metal rock and roll theme.
- ❖ The owner states that the corporate offices require outdoor music as part of venue. Without the music, they will need to locate at their second choice in NextdoorVille.
- ❖ They are moving into a long-vacant building and bringing needed investment into downtown.

## Case 1 - The Metal Headz Café SRU



## Case 1 - The Metal Headz Café SRU

### Public Hearing Testimony

- ❖ “Louisville shouldn’t have chain restaurants, only locally owned businesses.”
- ❖ “We need this business for additional sales tax.”
- ❖ “There are too many other restaurants on this block.”
- ❖ “I won’t be able to sleep with the noise from the patio and it will decrease my property value.”
- ❖ “This is great for downtown, and local residents should have known better when they bought their house.”
- ❖ “I know the new owner, and she is a great person and is trustworthy.”
- ❖ “The patrons will be congregating in the streets smoking cigarettes.”

## Case 1 - The Metal Headz Café SRU

SRU Criteria for Patio – What would be appropriate findings on each of the following criteria considering the proposal and testimony?

- ❖ “The SRU would not be contrary to the general welfare and economic prosperity of the City and immediate neighborhood.”
- ❖ “The SRU would be compatible with the character of any surrounding established areas.”
- ❖ “The external effects of the proposal are controlled, considering compatibility of land use.”

Scenario: A residential developer is requesting a PUD with a height waiver to allow a 50-foot, three-story building in a zone that allows 35 feet. The surrounding properties are residential, office and City open space and trails. Site/Landscape plan and elevations...







## Case 2-The Height Waiver

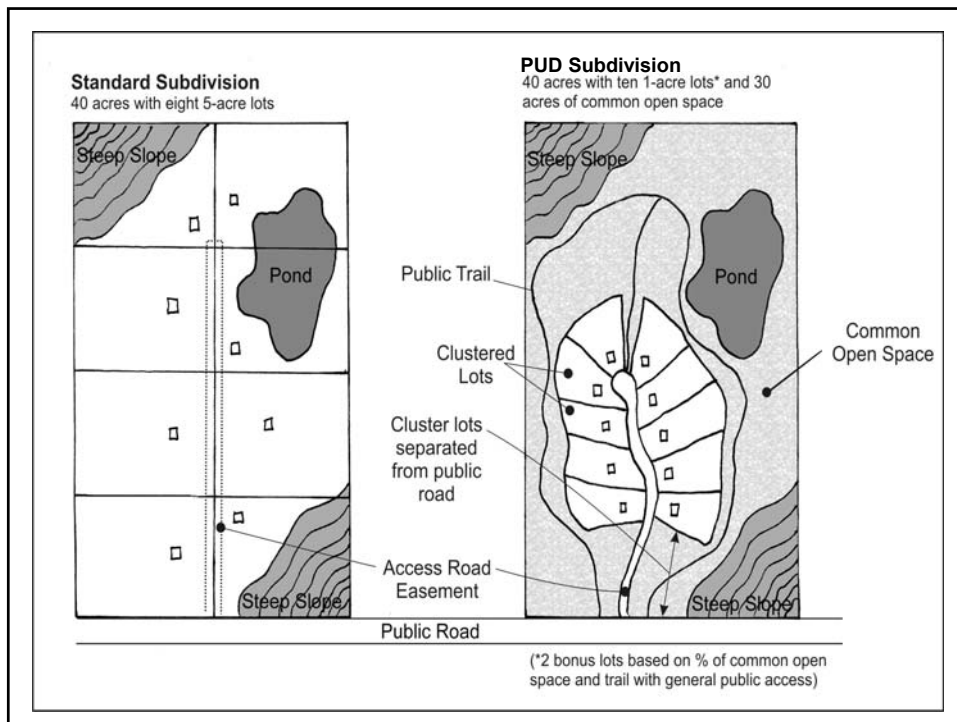
Here are four relevant PUD criteria that need to be applied and findings made:

1. An appropriate relationship to surrounding area.
2. Privacy in terms of individuals, families and neighbors.
3. Building types in terms of appropriateness to density, site relationship and bulk.
4. Landscaping of total site in terms of purpose, such as screening, ornamental types used, and materials used, if any; and maintenance and suitability and effect of the neighborhood.

How does Council go about evaluating these issues?

## Case 3-The Agricultural Subdivision

- ❖ The applicant desires to plat 40 acres he owns in the City Agricultural (Ag) zone
- ❖ The minimum required lot area is 5 acres
- ❖ The property has a pond and some forested steep slope areas
- ❖ The applicant sees a “win-win” in proposing a PUD under which the applicant will request a few more lots but will place the pond in common open area...



## The Agricultural Subdivision – Lot Area

- ❖ Standard: Minimum lot area – 17.12.040 – five acres
- ❖ First things first: Does Council have authority to hear a PUD to alter the standard?
- ❖ If no, then no jurisdiction.
- ❖ If yes...how do we know Council has jurisdiction, and what are its limits?
  - ❖ “Application for a planned unit development may be made for land located in any zoning district.” 17.28.020.A
  - ❖ Except for those requirements specifically waived or modified in the planned unit development process approved hereunder, the yard and bulk requirements stated in chapter 17.12, chapter 17.13, and adopted city development design standards and guidelines shall apply...”.

## The Agricultural Subdivision – Lot Area

- ❖ And what are the criteria for altering the standard?  
17.28.110: “All requirements applicable to the underlying zoning district... including, but not limited to, lot area...shall apply to planned unit developments.... However, any such requirements may be waived or modified through the approval process of the planned unit development if the spirit and intent of the development plan criteria contained in section 17.28.120 are met and the city council finds that the development plan contains areas allocated for usable open space in common park area in excess of public use dedication requirements or that the modification or waiver is warranted by the design and amenities incorporated in the development plan, and the needs of residents for usable or functional open space and buffer areas can be met.”

## The Agricultural Subdivision – Open Space

- ❖ The applicant proposes the pond—which is needed for drainage—be HOA open space, but you think it should be public. The applicant counters he will agree only if the pond is credited as PLD.
- ❖ Same exercise applies – what are the criteria? And how do they apply?
  - ❖ Sec. 16.16.060.C: “Retention ponds or other land left open solely for the purpose of the development, such as land under power lines, will not be considered as part of the [public] land dedication required under this section.”

## The Agricultural Subdivision – Open Space

But, how about this criteria—17.28.080.A—and how do you reconcile the two?

“A. Open space, in addition to the public use dedications specified in title 16, may be required by the city council upon recommendation by the planning commission. The requirement for additional open space will be based on the following factors:

1. Comprehensive development plan (including matters of state interest);
2. Topography, drainage, vegetation and other such physical conditions;
3. Anticipated socio-economic conditions;
4. Type and density of development and employment;
5. Overall need for open space and recreational facilities.

Such open space shall be owned and maintained as common open space by the developer or by an organization...unless the city accepts dedication of the open space through mutual agreement....”

## Liability & Closing Out the Hearing

- ❖ Be cautious once you’ve voted on a matter:
  - ❖ Let your record and decision speak for itself.
  - ❖ Don’t undermine the group decision even if you disagree, have regrets or were in the minority.
  - ❖ If you feel there is a need to change it, use proper channels only.
  - ❖ Recognize that some decisions cannot be undone without liability.
- ❖ Whether before, during or after the hearing, don’t subscribe to any “parallel process” – Rather, respect, follow and be a champion of the fair and due process that you are set up to provide.

## Liability & Conditions of Approval

- ❖ Contentious land use hearings lend themselves to quasi-judges seeking to resolve difficult issues through conditions of approval. This is problematic where:
  - ❖ The condition is not based upon any established City legislation.
  - ❖ The condition is an attempt to regulate a matter over which you have no authority.
  - ❖ The condition itself is vague or difficult to enforce.
- ❖ In difficult cases, avoid drafting conditions on the fly; have them drafted and/or reviewed by staff & counsel.
- ❖ Consider asking the applicant whether they agree to the conditions (though their doing so does not foreclose their right to challenge the conditions later).

## Remedies and the Substance-Process Distinction

- ❖ Colorado Rule of Civil Procedure Rule 106(a)(4): Is a rule established by Colorado Supreme Court for appealing quasi-judicial decisions.
- ❖ Your decision is reviewed by the district court.
- ❖ District court relies on the evidence that was produced at your hearing – there is no new trial.
- ❖ If you did not “abuse your discretion” or “exceed your jurisdiction,” your decision will be upheld.
- ❖ This standard is deferential—the court must uphold your decision as long as you followed proper procedures and there is competent evidence *in your record* to support your decision.
- ❖ The remedy in a 106 action is to reverse your decision and remand the matter back to City Council for a new hearing. This state remedy does not include money damages.

## Constitutional Claims - Section 1983

- ❖ But, a litigant could pursue a claim under federal law, which can include a claim for money damages. For, example, 42 USC Section 1983 states:

“Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.”

- ❖ Does not itself establish or create any substantive rights. It is a remedy in money damages for violations of constitutional or other federally protected rights. Liability is premised upon (1) an action under color of law and (2) a violation of a constitutional or other federally protected right.

## Constitutional Claims – Section 1983

- ❖ Actions of government entities and public officials in the course of their responsibilities will be considered actions “under color of law.”
- ❖ For liability under Section 1983, there is no monetary limit on the damages a plaintiff can win.
- ❖ Additionally, a plaintiff who “substantially prevails” in a Section 1983 claim will be entitled to an award of attorney’s fees.
- ❖ Attorney’s fees can far exceed any damages award – a nominal damages award can support hundreds of thousands of dollars in attorney’s fees.
- ❖ This is why procedural fairness in quasi-judicial hearings is so critical: it’s a constitutional right that can be enforced through Section 1983 and the remedies available for a constitutional violation.

## Constitutional Claims – Section 1983

- ❖ Most frequently, in land use cases the underlying constitutional rights alleged to have been violated include:
  - ❖ Fifth Amendment: requires a property interest protected by the Constitution.
  - ❖ **Procedural due process: the right to notice and a fair hearing before taking government action.**
  - ❖ Equal protection: the right to have legislation and actions applied evenhandedly to all persons similarly situated in a designated class.
  - ❖ Substantive due process: the right to be free from irrational and unreasonable conduct.
  - ❖ First Amendment: interference with expression, religious freedom.

Because of the property interests involved, there is a heightened risk and standard of review for quasi-judicial actions as to process:

*From a liability and judicial review point of view, what you decide is not as important as how you arrive at your decision*

- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>❖ Process/How you decide:<ul style="list-style-type: none"><li>❖ Unsupported and legally reversible decisions are <u>almost always</u> based on a lack of due process or procedural irregularities with an applicant or opponent.</li></ul></li></ul> | <ul style="list-style-type: none"><li>❖ Substance/What you decide:<ul style="list-style-type: none"><li>❖ The basis or “logic” of a City’s decision is afforded great deference under Colorado law, where the standard of review, generally speaking, is whether there was <u>any competent evidence in the record to support your decision.</u></li></ul></li></ul> |
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## Lessen Your Risk? Have a Good Process!

- ❖ **IF** your hearing has been carried out properly, and **IF** your decision has been issued based on facts in the record and application of proper legal criteria, then:
  - ❖ Decision will be upheld;
  - ❖ Other recourse (such as a claim of a constitutional violation) will likely be unavailable or unsuccessful; and
  - ❖ The general risk of dispute and will be reduced.
- ❖ But **IF** there are procedural flaws in the hearing or the decision, opponents may be more willing to pursue a challenge and a claimant may seek redress for a constitutional violation.

## Top 10 Ways to Get Sued in Land Use Matters

10. Don't tell the applicant what the rules are.
9. Engage in ex-parte communications.
8. Refuse to consider your own codes, ordinances or regulations.
7. Make a decision or impose a condition that exceeds your authority.
6. Ignore the record developed at your hearing.



## Top 10 Ways to Get Sued in Land Use Matters

5. Ignore the advise of your staff and attorney.
4. Conspire to undermine a proposal or impede a development.
3. Make a decision on the basis of personal views or beliefs rather than the applicable criteria.
2. Retaliate against competitors or political opponents with respect to their land use matters.
1. Act willfully and maliciously towards parties in a land use proceeding.

**QUESTIONS - THANK YOU!**